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In the Supreme Court of the United States

OCTOBER TERM, 1937

THE CENTURY INDEMITY COMPANY
(a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

Petition for Writ of Certiorari To the United States Circuit Court of Appeals for the Ninth Circuit.

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Respondent.

Petition for Writ of Certiorari To the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Century Indemnity Company, a corporation, respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment entered by that court in the above entitled cause on June 7, 1937, affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 167-181) is reported as ..... F. (2d) ..... The District Court made special findings (R. 35-49), but rendered no opinion.

SUMMARY STATEMENT OF PROCEEDINGS BELOW.

Respondent brought action in the District Court to recover the sum of $6000 on a bond or undertaking executed by petitioner to release an attachment levied in a state court action. Petitioner prevailed originally but the judgment was reversed and a retrial ordered (65 F. (2d.) 765). Respondent prevailed on the retrial and the judgment was affirmed on June 22, 1936 (R. 164-165). The opinion is in the record (R. 152-164) but is otherwise unreported. Rehearing was granted August 17, 1936 (R. 165). The judgment to be reviewed was entered on June 7, 1937, and the judgment affirmed on procedural grounds by a divided court (R. 182). Petition for rehearing was denied on July 19, 1937 (R. 182), and the issuance of the mandate stayed until September 1, 1937, and thereafter until the final determination of this petition (R. 183).

JURISDICTION.

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code (U. S. C. 28:347; 43 Stat. 938).

SPECIFICATION OF ERRORS.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts of appeals in matters of procedure.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the matter of considering plain error.

SUMMARY STATEMENT OF THE CASE.

On February 14, 1929, petitioner executed a bond or undertaking in the penal sum of $6000 to release an attachment levied on the property of defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, and L. Silberman, in a state court action entitled "Berges v. Abraham, et al." (R. 36-41). On February 26, 1929, Fidelity and Casualty Company of New York, a corporation, executed a bond or undertaking of the same character and amount to release an attachment levied in said action on the property of defendant N. Abraham (R. 47-48). Plaintiff Berges in the state court action recovered judgment on October 29, 1929, for the sum of $5643.65 against defendants Abraham, L. Silberman, and San Francisco Iron & Metal Company (R. 41-42). Fidelity and Casualty Company of New York thereupon paid Berges the amount of the judgment with interest and costs (R. 42), took an assignment thereof in the name of respondent G. Nelson (R. 42), and commenced the present action against petitioner to recover

the full amount thus paid with accruing interest (R. 10).

The present action was twice tried. The outcome of the first trial was judgment for petitioner on the theory that Fidelity and Casualty Company of New York was obligated under its said bond or undertaking to pay the judgment in the state court action and that when it paid plaintiff Berges the full amount thereof the judgment was satisfied and extinguished; and that, as the complaint was based solely on an assignment, the pleadings were insufficient. In reversing that judgment and ordering a retrial the Circuit Court of Appeals said that the payment thus made amounted "to an assignment of the judgment with a right to enforce the same to the extent to which the assignee would be entitled to recover by way of contribution or reimbursement and no more." (65 F. (2d) 765, 767).

The outcome of the second trial was judgment for respondent for the full amount paid by Fidelity and Casualty Company of New York with accruing interest (R. 50-51). Prior to submission of the cause both parties moved for special findings (R. 130), and on May 31, 1934, judgment was ordered for respondent "upon Findings of Facts and Conclusions of Law to be presented" (R. 20-21). Both parties accordingly proposed special findings and conclusions, respondent on June 6, 1934 (R. 35-49), petitioner on June 11, 1934 (R. 21-35). Those proposed by respondent were accepted and signed by the trial judge on June 16, 1934 (R. 49). Those proposed by petitioner were

rejected and refused. The procedure thus followed by the court and the parties conformed to Rule 42 of the said District Court[1] (R. 170).

On appeal from the judgment petitioner urged that the judgment lacked evidentiary support. It urged

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1. Rule 42: "In actions at law in which a jury has been waived by written stipulation filed by the parties or by oral stipulation made in open court and entered in the record, it shall be in the discretion of the Court to make special findings of fact and conclusions of law upon the issues raised by the pleadings.

In suits in equity, including those required to be heard before three judges, and in granting or refusing interlocutory injunctions, the Court shall find the facts specially and state separately the conclusions of law upon the issues raised by the pleadings. in accordance with Supreme Court Equity Rule 70½ as amended November 25, 1935.

In actions at law, where a request for special findings of fact is made and granted, and in suits in equity, no judgment or decree shall be entered until the findings of fact and the conclusions of law shall have been signed and filed, as herein provided. The rendition of the opinion or memorandum order shall be deemed and considered as merely a preliminary order for judgment or decree.

Within five days after written notice of the opinion or memorandum order, the prevailing party shall prepare a draft of the findings of fact and the conclusions of law, and lodge them with the Clerk, serving a copy thereof upon the adverse party, who may, within five days thereafter, lodge with the Clerk and serve upon the adverse party such proposed amendments or additions as he may desire. If the prevailing party fails to lodge and serve such draft within five days, as herein provided, the adverse party may, within five days thereafter, prepare and lodge a draft, serving a copy on the prevailing party.

The findings of fact and the conclusions of law shall thereafter be settled by the Judge, and when so settled, shall be engrossed, and approved as provided in Rule 22, within five days thereafter, and shall be then signed by the Judge and filed.

A failure to comply with the requirements of this rule may be deemed to be a waiver by the party so failing.

Findings of fact must be of the ultimate facts in issue, as distinguished from conclusions of law on the one hand, and mere evidence on the other, and must cover all the material issues raised by the pleadings, which facts must be set out in narrative form and not incorporated by reference to the pleadings."

that the judgment was not supported by the findings of fact. It urged that the judgment was contrary to the law of the case established on the former appeal. And it urged that the trial court had erred in its rulings on evidence. The attack on the sufficiency of the evidence was stressed in connection with assignments of error directed at the refusal of the trial court to find in accordance with petitioner's proposed findings. Respondent joined issue solely on the merits of the appeal and at no time challenged the form or sufficiency of any assignment or specification of error made by petitioner.

The Circuit Court of Appeals affirmed the judgment on June 22, 1936 (R. 164-165), granted a rehearing on August 17, 1936 (R. 165), and again affirmed the judgment on June 7, 1937 (R. 181-182).

In the opinion of June, 1936, the Circuit Court of Appeals concluded that every assignment and specification of error made by petitioner was defective in form and insufficient to evoke consideration (R. 151-164). It concluded that the trial had been completed before findings of fact and conclusions of law were signed by the trial court and, therefore, that the actions and rulings thereon could not be reviewed on appeal (R. 153-154). Notwithstanding a technical outlook on the procedural aspect of the case the Circuit Court of Appeals commented on the merits of the appeal and concluded that the judgment possessed evidentiary support (R. 163); that the judgment was supported by the findings of fact (R. 162); that the judgment was not contrary to the law of the case (R.

162); and that there was no error in the rulings on evidence (R. 162). It saw no occasion to notice plain error (R. 164).

The petition for rehearing addressed to the opinion of June, 1936, urged that the conclusions on procedure were too technical and that the conclusions on the merits of the appeal were unsound.

In the majority opinion of June, 1937, after rehearing, the decision was based solely on procedural grounds and all reference to the merits of the appeal eliminated. (R. 167-175). This is persuasive indication that petitioner's points on the merits were well taken. The minority opinion (R. 176-181) sums up the position of petitioner. It is there said:

> "What is important is, that appellee never then questioned that the court is sufficiently advised of the claimed merits of the appeal by the assignment of error which says that judgment is not sustained *either* by the evidence or by the findings. He did not only not raise any question as to the imperfection of the assignment, but he assumes, and, in effect, by his slience, admits it is good." (R. 176-177).

> "In this case there is no failure to assign as error that the findings did not support the judgment. The assignment is there; it was clear—so clear that it caused our ruling on it. What is done by this second opinion and decision, to which this is a dissent, is to refuse to consider the merits of the petition for rehearing by striking out from the original opinion the holding to which the petition is addressed, thereby basing the opinion solely on this issue of the violation of

our rule requiring separate statements of assigned error," R. 178-179).

"Even if the error has not been assigned at all, we have exercised our discretion to consider it and, in my opinion, would have abused that discretion if we had not. *After having exercised it,* it seems a denial of justice to frustrate the consideration of the correctnes of our ruling by the mere process of blotting it out of the opinion to which the petition is addressed." (R. 179.)

"The suggestion that a *claim* of plain error is not sufficient, but that there must actually have been error to cause our examination of the record, involves a casuistry which defeats itself." (R. 179.)

"Since the jurisdiction is here and the parties are here, each urging his contention on the merits of the claim of appellant, and appellee does not complain of the assignment; and since the assignment fully informs us of what the contention is, our industrious discovery of a technical procedural reason for refusing to consider its merits cannot be said to be the search for justice for which the Federal courts were created." (R. 180.)

"Concerning Rule 42 of the United State District Court for the Northern District of California, it is my opinion that this rule was intended to create a situation equivalent to a treatment of the decision as merely tentative and thereby extending the trial, and not to create a final disposition of the cause." (R. 180.)

REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI.

(1) **The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts of appeals in matters of procedure.**

The decision sought to be reviewed is in direct conflict with decisions of the Second and Eighth Circuit Courts of Appeals:

Thompson-Starrett Co. v. La Belle Iron Works (2 C. C. A.), 17 F. (2d) 536, 539;

United State Fidelity & G. Co. v. Board of Com'rs (8 C. C. A.), 145 F. 144, 151;

Mercantile Trust Co. v. Wood (8 C. C. A.) 60 F. 346, 348.

In *United States Fidelity & G. Co. v. Board of Com'rs*, supra, it was said at page 151:

> "The verdict of a jury concludes all issues of fact and of mixed law and fact save those questions of law which have been reserved for review by demurrer, motion, request, or exception. A finding of the court without a jury has the same effect, with the single exception that when the finding is special the question whether the facts found sustain the judgment is open to review. In the trial of an action by the court without a jury the rulings of the court in the progress of the trial, and those only, are open to review. The true test for determining whether or not a question or ruling in a trial by the court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury.

> The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of a trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

In *Mercantile Trust Co. v. Wood,* supra, it was said at page 348:

> "The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed, the trial is ended. Exceptions to the finding, or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with it, avail nothing. They are as futile as exceptions to the verdict of a jury. When a case comes to this court upon a writ of error, this is a court for the correction of the errors of the court below solely. To enable us to review those errors in a case tried by the court it must appear that the legal propositions on which they rest were presented to that court and ruled upon before the trial ended, unless they are involved in the single question whether or not the facts found in a special finding are sufficient to sup-

port the judgment. It is, in the words of the statute, 'the rulings of the court in the progress of the trial of the case,' and these only, that we are authorized to review, unless such rulings are involved in the single question we have mentioned."

And in *Thompson-Starrett Co. v. La Belle Iron* Works, supra, it was said at page 539:

"It seems to us a needless and idle form to require the party aggrieved to request a ruling that putative future findings, or special findings already made, are without any evidence, and we regard an exception taken on that ground before final action of the court an exception to rulings made 'in the progress of the trial'."

The foregoing authorities are in accord with the statement of this Court in *Alexander v. Machan,* 147 U. S. 72:

"If the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court."

Contrary to the rule of the foregoing decisions the present decision is committed to the rule that the trial in the District Court ended on May 31, 1934, when the trial judge ordered judgment for respondent, and not on June 16, 1934, when the trial judge took final action by signing the special findings and conclusions which had been proposed and settled in accordance with the order of the court under its own Rule 42. As the trial was still in progress until the final action of the trial judge his actions and rulings on special findings were clearly reviewable on appeal. The Circuit Court of Appeals was distinctly in error in declining to review the assignments and specifications of error based upon such actions and rulings. Said Rule 42 does not transcend any statute limiting review on appeal. It merely regulates the manner in which a trial by the court is to end.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the matter of considering plain error.

This Court has held that a total absence of evidentiary support constitutes plain error.

Wiborg v. United States, 163 U. S. 632;
Clyatt v. United States, 197 U. S. 207.

This Court has also held that the failure to make a finding to support a judgment should be noticed as plain error.

Mahler v. Eby, 264 U. S. 32.

Where, as in the present case, an appellee does not challenge the form of the assignments or specifications

of error, it is the particular duty of an appellate court to notice plain error.

Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547.

Plain error is always present where, as in the instant case, a judgment is contrary to the law of the case. In such cases the plain duty rests on a court of appeal to examine the record, after retrial, to see if the judgment works violence to the law of the case.

Continental Ins. Co. v. Reading, 259 U. S. 156;
In Re Sanford Ford & Tool Co., 160 U. S. 431;
The Santa Maria, 10 Wheat. 431;
Mitchell v. United States, 15 Pet. 52.

Where facts are not found to justify a judgment, plain error is always present and may not be ignored by an appellate court. The appellate court cannot supply findings: its duty is to reverse the judgment.

E. A. Packer (Steam Tug E. A. Packer v. New Jersey Lighterage Co.), 140 U. S. 360;
Preston v. Prather, 137 U. S. 604.

This Court has accorded a very broad meaning to the term "plain error." In *Pierce v. United States,* 255 U. S. 398, an improper allowance of interest was deemed "plain error," and in *Columbia Heights Realty Co. v. Rudolph,* 217 U. S. 547, the court examined the following questions as typifying "plain error": (a) error in allowing an assignment; (b) error because jurors were not examined as to their qualifications; (c) error in overruling a plea of *res judicata;* (d) errors in instructions; and (e) error in

refusing to review evidence and determine if a verdict was unjust and unreasonable.

The majority opinion of the Circuit Court of Appeals recites point after point disclosing "plain error" but it declines to review them for reasons of technical procedure. As said in the dissenting opinion, "The Supreme Court makes no such mistake." (R. 179.)

CONCLUSION.

Wherefore petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment in the above entitled cause be reviewed and reversed.

Dated, San Francisco, California.
August 23, 1937.

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